Saia Motor Freight Line, Inc. *and* General Drivers, Warehousemen and Helpers Local Union 745, a/w International Brotherhood of Teamsters. Cases 16–CA–19981, 16–CA–19981–2, and 16–CA–19981–4

April 4, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

On March 17, 2000, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The Respondent filed exceptions, a supporting brief, and an answering brief. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order as modified.[2]

1. In his decision, the judge found that the Respondent did not engage in unlawful surveillance, and did not create the impression of surveillance of the employees' union activities when it photographed the Union's handbilling on August 26, 1999. For the reasons set forth below, we agree.

At the start of the union handbilling session, 30 to 40 individuals distributed handbills in the center of the driveway to truckdrivers entering and exiting the Respondent's facility. The record shows that the large number of handbillers at least occasionally slowed down incoming traffic, and that this prompted the Respondent to call the police at least twice to handle the situation. Although the police moved most of the handbillers from the center of the road, the Respondent still received complaints that the traffic entering its facility was impeded by the union activity. This raised safety concerns about possible vehicular collisions and potential negligence liability for the Respondent, particularly in light of the fact that the handbilling occurred as the truckdrivers were turning off of a public road and were forced to unexpectedly reduce their speed to avoid potential accidents. After considering all the record testimony, the judge specifically found that the "handbillers did in fact interfere with the flow of traffic into and out of the terminal." The Respondent made the decision to photograph the handbilling activity after it became dissatisfied with the efforts of the police to minimize the congestion.

The Board has long held that absent proper justification, photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate. *F. W. Woolworth*, 310 NLRB 1197 (1993). In *Woolworth,* the Board adhered to the principle that photographing in the mere belief that "something 'might' happen does not justify Respondent's conduct when balanced against the tendency of that conduct to interfere with the employees' right to engage in concerted activity." *Flambeau Plastics Corp*., 167 NLRB 735, 743 (1967), enfd. 401 F.2d 128, 136 (7th Cir. 1968), cert. denied 393 U.S. 1019 (1969).

Based on the above, we find that the Respondent's reason for photographing the handbillers was not based on the mere belief that "something might happen." Rather, the record shows that the traffic was impeded by the handbilling and that the Respondent had a legitimate safety concern because of the potential for accidents. Significantly, the Respondent did not photograph the handbillers when they first arrived at the entrance to its terminal and only did so when it became dissatisfied with the efforts of the police to minimize traffic congestion. For these reasons, we find that the Respondent established proper justification for taking the photographs. Accordingly, we conclude that the Respondent did not engage in surveillance or create the impression of surveillance in violation of Section 8(a)(1) of the Act.

2. In his decision, the judge found that the Respondent violated Section 8(a)(1) by promulgating an overly broad no-solicitation/no-distribution rule to discipline employee Steve Lucas; and Section 8(a)(3) and (1) by issuing a disciplinary warning to Lucas for supporting the Union and engaging in protected concerted activity. Although we agree with the judge that the Respondent interfered with Lucas' Section 7 rights and unlawfully issued a disciplinary notice, we find it unnecessary to engage in a *Wright Line* analysis[3] in finding that the disciplinary warning violates the Act. Instead, we find the disciplinary notice unlawful for the following reasons.

[1] No exceptions were filed to the judge's finding that the Respondent did not violate Sec. 8(a)(1) of the Act by threatening employees that it would close the Grand Prairie facility if the employees voted for the Union, or by interrogating employee Ray Lucas about the union activities of other employees.

[2] We shall modify the judge's recommended Order to correct inadvertent errors and conform with *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 324 NLRB 17 (1997).

[3] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under the *Wright Line* framework, the judge found that the General Counsel "establishe[d] a presumption" that the Respondent disciplined Lucas because of his union activity. The judge also found that the Respondent failed to show that it would have taken the same action against Lucas absent his union activity.

On July 21, 1999, M.D. Hardwick, the Respondent's Dallas terminal manager, called Lucas into his office and told Lucas that he was being warned because Lucas "had been in the Jonesboro terminal with union literature," had made the literature available to employees, and had been "talking to the employees about the Union and the organizing effort." Lucas was also told that this was in violation of company policy and "that if it didn't stop, it could lead to further disciplinary action up to and including discharge." The judge found, and we agree, that by issuing this oral warning to Lucas, Hardwick was "imposing on Lucas an overly broad no-solicitation and no-distribution rule" in violation of Section 8(a)(1) of the Act.

Hardwick also placed in Lucas' file a written memorandum documenting the July 21, 1999 meeting. That memorandum states that Lucas' distribution of "UNION literature at the Jonesboro terminal" was a "direct violation" of the Respondent's no-solicitation policy and would "not be tolerated. Any further incidents of this nature will result in disciplinary action." The judge found that this memorandum "states an overly broad no-solicitation/no-distribution rule, specifically targeting the distribution of union literature." Thus, this written warning was issued to Lucas because he violated an unlawful, overly broad no-solicitation/no-distribution rule. "Any disciplinary action taken pursuant to an unlawful no-solicitation rule is likewise unlawful, analogous to the 'fruit-of-the-poisonous-tree' metaphor often used in criminal law." *Opryland Hotel*, 323 NLRB 723, 728 (1997), citing *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 931 fn. 9 (5th Cir. 1993). See *A.T. & S.F. Memorial Hospitals*, 234 NLRB 436 (1978) (reprimand resulting from employer's enforcement of an unlawful no-solicitation rule "is itself unlawful"). See also *London Memorial Hospital*, 238 NLRB 704, 708 (1978) (discharge of employee for violating an overly broad rule constitutes a violation of Sec. 8(a)(3) and (1)). Because Lucas was disciplined for violating the Respondent's unlawful overly broad no-solicitation/no-distribution rule, that discipline itself constitutes a violation of Section 8(a)(3) and (1), without consideration of *Wright Line*'s dual-motivation analysis.

In addition, the written disciplinary warning itself makes clear that Lucas was being warned solely for "distributing union literature" at the Jonesboro terminal. "In these circumstances, where the conduct for which the Respondent claims to have [disciplined the employee] was protected activity, the *Wright Line* analysis is not appropriate." *Felix Industries*, 331 NLRB No. 12, slip op. at 3 (2000) (*Wright Line* analysis inappropriate where conduct for which respondent claims to have discharged employee was protected). For these reasons, we agree with the judge that the written warning notice issued to Lucas violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Saia Motor Freight Line, Inc., Grand Prairie, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Within 14 days from the date of this Order, rescind the disciplinary warning issued to employee Stephen Lucas on about July 21, 1999."

2. Substitute the following for paragraph 2(b).

"(b) Within 14 days from the date of this Order, remove from its files any reference to Lucas' unlawful disciplinary warning, and within 3 days thereafter, notify him in writing that this has been done and that the disciplinary warning will not be used against him in any way."

3. Substitute the following for paragraph 2(c).

"(c) Within 14 days after service by the Region, post at its facility in Grand Prairie, Texas and at all other places where notices to employees are customarily posted, copies of the attached notice marked "Appendix B."[3] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 13, 1999."

4. Substitute the attached notice for that of the administrative law judge.

MEMBER HURTGEN, concurring.

I do not agree that disciplinary action which is imposed pursuant to an unlawful rule is necessarily unlawful.[1] For example, if an employer has a rule that is unlawfully broad (e.g., solicitation is banned at all times), that rule would not necessarily render unlawful

[1] See the dissenting opinion in *Miller's Discount Department Stores*, 198 NLRB 281, 283 (1972).

the application of the rule to warn an employee to stop soliciting during worktime. In the instant case, it appears that employee Lucas was indeed soliciting during work time. However, the Respondent warned Lucas for soliciting, as distinguished from soliciting during working time. Indeed, the Respondent did not know, or care, whether the solicitation was on working time. In those circumstances, Member Hurtgen agrees that the warning was unlawful.

The same can be said about the warning concerning distribution. Again, Respondent warned Lucas about distributing union literature, not for distributing such literature in a work area. Respondent did not know, or care, whether the distribution was in a work area.

On a different matter, I agree with my colleagues that the *Wright Line* test is not appropriate with respect to the warning to Lucas. I note that my colleagues rely upon *Felix Industries*, supra. In *Felix*, I agreed with the principle, but I found that the activity in *Felix* was not protected.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees about their union activities or about the union activities of other employees.

WE WILL NOT issue written warnings or other discipline to employees because they joined or supported the Union or engaged in protected, concerted activities, or to discourage other employees from engaging in union or other protected, concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind the disciplinary warning we issued to employee Steve Lucas on about July 21, 1999.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplinary warning we issued to Lucas, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the disciplinary warning will not be used against him in any way.

SAIA MOTOR FREIGHT LINE, INC.

Elizabeth Kilpatrick, Esq. for the General Counsel.
Charles H. Hollis, Esq. (The Kullman Firm), of New Orleans, Louisiana, for the Respondent.
Rober Bridges, for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on February 15, 2000, in Fort Worth, Texas. After the parties rested, I heard oral argument, and on February 16, 2000, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The conclusions of law, remedy, Order and notice provisions are set forth below.

CONCLUSIONS OF LAW

1. The Respondent, SAIA Motor Freight Line, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, General Drivers, Warehousemen, and Helpers Local Union 745, affiliated with the International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union activities and the union activities of other employees, and by issuing a disciplinary warning on about July 21, 1999, to employee Stephen Lucas, because Lucas joined and/or supported the Union and engaged in protected concerted activities, and to discourage employees from engaging in such activities.

4. Respondent violated Section 8(a)(3) of the Act by issuing a disciplinary warning on about July 21, 1999, to employee Stephen Lucas, because Lucas joined and/or supported the Union and engaged in protected concerted activities, and to discourage employees from engaging in such activities.

5. Respondent did not violate the Act in other ways alleged in the Complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectu-

[1] The bench decision appears in uncorrected form at pages 280 through 313 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as App. A to this certification.

ate the policies of the Act, including posting the notice to employees attached hereto as Appendix B, and rescission and expungement of the disciplinary notice Respondent issued to employee Stephen Lucas on about July 21, 2000.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

ORDER

The Respondent, SAIA Motor Freight Line, Inc., Grand Prairie, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their union activities and about the union activities of other employees.

(b) Issuing disciplinary warnings or otherwise disciplining employees because they joined and/or supported the Union and engaged in protected concerted activities, or to discourage employees from engaging in such activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the disciplinary warning it issued to employee Stephen Lucas on about July 21, 1999, and remove all references to it from Lucas' personnel file and other records.

(b) Preserve and, within 14 days of request, make available to the Board or its agents for examination and copying, all records necessary to determine that the terms of this Order have been complied with.

(c) Within 14 days after service by the Region, post at its facility in Grand Prairie, Texas, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix B."[3] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

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This is a bench decision in the Case of SAIA Motor Freight Line, Inc., which I will call the "Respondent," and General Drivers, Warehousemen and Helpers, Local Union 745, affiliated with the International Brotherhood of Teamsters, which I will call the "Charging Party" or the "Union." The Case Numbers are 16–CA–19981–1, 16–CA–19981–2 and 16–CA–19981–4.

I heard this matter in Fort Worth, Texas, on February 15, 2000. After the presentation of evidence, counsel argued this case orally. On February 16, 2000, I issued this decision pursuant to Section 102.35, Subparagraph 10 and Section 102.45 of the Board's Rules and Regulations.

In its Answer, the Respondent has admitted certain allegations. Based upon those admissions and the record as a whole, I make the following findings.

The Complaint alleges, Respondent admits and I find that the charge in Case 16–CA–19981–1 was filed by the Union on July 14, 1999 and that a copy of it was served by first–class mail on the Respondent on July 15, 1999; the charge in Case 16–CA–19981–2 was filed by the Union on July 26, 1999 and a copy was served on Respondent by first–class mail on July 27, 1999; the charge in Case 16–CA–19981–4 was filed by the Union on August 30, 1999 and a copy was served by first–class mail on Respondent on the same date.

The Complaint alleges, the Respondent admits and I find that

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at all material times, Respondent, a Louisiana corporation with an office and place of business in Grand Prairie, Texas, has been engaged in interstate and intrastate transportation of freight; that during the past 12 months, Respondent, in conducting its business operations I have just described, derived gross revenues in excess of $50,000 for the transportation of freight from the State of Texas directly to destinations located outside the State of Texas.

Respondent further admits and I find that at all times material, it has been an Employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the National Labor Relations Act. The Complaint alleges, Respondent admits and I find that at all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

Paragraph 6 of the Complaint alleges that ten named individuals are Respondent's supervisors and agents within the meaning of Section 2(11) and Section 2(13) of the Act respectively. Respondent has admitted that eight of these ten are its supervisors and agents. Based upon Respondent's admissions, I find that Terminal Manager M. D. Hardwick, City Operations Manager Larry Nichols, Supervisor Dee Hopkins, Assistant Manager Don Safford, Director of Safety Richard C. Morgan, Human Resource Manager Marty Ready, Jonesboro, Arkansas, Terminal Manager Doug Hamm and Regional Manager John Smith are supervisors of Respondent within the meaning of Section 2(11) and its agents within the meaning of Section 2(13) of the Act.

Respondent has denied that the remaining two individuals named in Complaint Paragraph 6, Security Representative Ray Rios and Security Guard Mildred Shively, are its supervisors and agents.

The evidence established that the Respondent's parent corporation, Yellow Corporation, employs Rios as a security investigator. To establish that Rios is a supervisor of Respondent within the meaning of Section 2(11) of the Act, the General Counsel must prove that Rios has authority, in the interest of Respondent, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or responsibly to

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direct them or to adjust their grievances or effectively to recommend such action. The General Counsel must also prove that the exercise of this authority requires the use of independent judgment. See 29 U. S. C., Section 152(11).

I find that the Government has not met its burden of proof. The record does not establish that Rios exercises any of the supervisory powers listed in Section 2(11).

However, I find that the record does establish that Rios was acting as agent of the Respondent when he set up still and video cameras in the Respondent's guard shack and took photographs of Union handbillers in August 1999. Rios credibly testified that before he got his cameras and set them up on tripods in the Respondent's guard shack, he conferred with Respondent's human resources department and with Respondent's management.

The record further establishes that Respondent's management decided that such photographs should be taken, but as unobtrusively as possible. When Rios set up his cameras inside the guard shack and took photographs through the window, he was following these instructions. I find that Rios was acting pursuant to and within the scope of the authority Respondent's management conferred upon him to take these photographs. Therefore I conclude that Rios was an agent of the Respondent within the meaning of Section 2(13) of the Act.

The General Counsel has not proven that security guard

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Mildred Shively was either a supervisor of Respondent or its agent.

I will now address the contested allegations in the order they appear in the Complaint. For clarity, it may be noted that the terms, "Dallas terminal" and "Grand Prairie terminal" refer to the same facility, a freight terminal located in Grand Prairie, Texas, which serves the Dallas area.

Complaint Paragraph 7(a)

Complaint Paragraph 7(a) alleges that in late June 1999, the exact dates unknown to the General Counsel, Respondent, by M. D. Hardwick, Don Safford, John Smith and Dee Hopkins, at Respondent's Grand Prairie facility, threatened employees that Respondent would close the facility if the employees voted for the Union.

To prove this allegation, the General Counsel relies upon the testimony of Ricky Carlton, employed by Respondent as a city driver, and a member of the Union's in–plant organizing committee. Carlton testified that during the Union's organizing campaign, the city drivers and other employees at the Dallas terminal attended a meeting at which more than one manager spoke.

According to Carlton, Roger Safford, the Assistant Terminal Manager, may have done most of the talking. It appears that Safford, whose full name is Donald Roger Safford, is the same individual referred to as "Don Stafford" in Complaint Paragraph 7(a). I so find.

Carlton testified, "I remember plainly that he

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said that if the union had came in, that—SAIA would close its doors in Dallas." By "he," Carlton was referring to Safford.

Carlton further testified that during this meeting, the Regional Operations Manager, John Smith, asked employees what they thought Jim Crisp would do if the Union came in. Crisp apparently was the corporation's chief executive officer at that time.

According to Carlton, Operations Manager Smith answered his own question by suggesting that, if the Union represented the employees at the Dallas terminal, top management would divert the freight shipments to other terminals.

Both Safford and Smith denied making this statement which Carlton attributed to them. Additionally, the testimony of City Driver Manager Dee Hopkins, who attended the meeting, supports Safford and Smith. It should be noted, however, that these denials were rather conclusory, and Respondent adduced little evidence about what Safford, Smith and other managers told the assembled employees.

Terminal Manager M. D. Hardwick also attended the meeting, but his testimony falls short of corroborating Safford and Smith. Hardwick denied that he ever said Respondent would close if employees selected the Union to represent them; however, he was not asked whether Safford or Smith made such a statement.

It concerns me that the managers who spoke at the meeting did not describe what they told employees. For example, Safford testified that he read from a prepared script; however,

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Respondent did not offer the script into evidence, and Safford said little about the substance of his speech.

While cross–examining Carlton, Respondent's counsel suggested that Safford may have made a statement about a shut–down of the business in the context of a strike called by the Union. In other words, Respondent implied that perhaps the manager really said that the Union could shut down the business by calling a strike but Carlton misunderstood that remark and considered it a threat that the Company would shut down its business in retaliation.

However, Carlton did not agree with the Respondent's suggestion. Similarly, Carlton did not recall Smith associating a diversion of freight from the Dallas terminal with the possibility of a strike closing down that facility.

If Respondent's witnesses had described what they said at the meeting, it might be possible to determine whether Carlton had merely misunderstood their speeches. But the managers

were silent on this subject, creating a sort of vacuum, which nature abhors and judges find uncomfortable. There is a tendency to fill this vacuum by crediting the only substantial account of what the managers did say at the meeting, which is the testimony of Carlton.

Nonetheless, I do not believe Carlton's testimony was reliable, and do not credit it. In reaching this conclusion, I have considered several factors.

While testifying, Carlton appeared to have some difficulty

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understanding and responding to questions, and part of this difficulty may reflect a problem with memory. When asked about an inconsistency between his testimony and his pretrial affidavit, Carlton acknowledged that he had better recollection of the events at the time he gave the affidavit. Additionally, the record indicates that Respondent's managers actually conducted more than one meeting with employees, but Carlton's testimony was somewhat confusing on this issue.

Considering Carlton's difficulty in reporting the events exactly, his testimony would have inspired greater confidence if it had been corroborated by another witness. Although four other employees testified on behalf of the General Counsel, their testimony focused on other matters, and they did not corroborate Carlton's account of the meeting at which Safford and Smith spoke.

A threat to close a facility lands on the listener with considerable impact. It is not something that an employee is likely to forget. The fact that no employee witness corroborated Carlton's account raises a significant doubt about it. That doubt, together with Carlton's difficulty recalling the events, leads to the conclusion that his testimony is not reliable. I find that the Government has not proven the allegations in Complaint Paragraph 7(a), and recommend that they be dismissed.

Complaint Paragraph 7(b)

Complaint Paragraph 7(b) alleges

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that in early July 1999, the exact date unknown to the General Counsel, Respondent, by Doug Hamm, at Respondent's Jonesboro, Arkansas, facility, interrogated an employee about the union activities of other employees.

One of Respondent's drivers, Ray Lucas, testified that sometime in July 1999, he made his first trip from Dallas to Jonesboro, Arkansas, to deliver freight, and he did not know anyone at the terminal in Jonesboro. According to Lucas, he was barely in the door of the terminal building when the terminal manager, Doug Hamm, approached and asked, "What's going on in Dallas?"

Exactly what Lucas said in response is not clear from his testimony. First, Lucas testified that he told Hamm that he could not talk about it, to which Hamm said, "Why a union?"

However, Lucas also testified that when Hamm asked him what was going on in Dallas, he "tried to act dumb" and told Hamm he did not know what Hamm was talking about. At that point, according to Lucas, Hamm asked about the Union.

Lucas portrayed himself as reluctant to provide information about the Union. He testified that Hamm asked him several times before he described what the employees wanted from Union representation. Lucas also testified that Hamm asked him for literature about the Union but Lucas had brought none with him.

The testimony I have just summarized pertains to the allegations in Complaint Paragraph 7(b). Lucas also described what happened at Jonesboro after this point. Although this

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testimony pertains to the allegations in Complaint Paragraph 9, rather than Complaint Paragraph 7(b), it serves clarity to continue here with his account.

Lucas testified that after speaking with Manager Hamm, he went outside, where a young man was hooking two 28–foot trailers to his tractor. The record indicates that this man was Berry Shane Moye. According to Lucas, the man asked about the Union and expressed fear that Respondent would close the Jonesboro terminal if the employees chose the Union to represent them.

Lucas could not explain why Hamm and Moye independently brought up the subject of the Union. Lucas said he was not wearing any insignia which would identify him as a Union supporter.

Lucas made a second trip from Dallas to Jonesboro two days after his first trip. He testified that as soon as he walked through the Jonesboro terminal door, Hamm asked him if he had brought some Union literature, and Lucas replied yes, but he did not think he could give it to Hamm, who was the manager. According to Lucas, Hamm looked around, saw no one else and then said, "It's just between you and me. I'm not going to tell anybody." Lucas then gave Hamm some Union literature. He did not see Moye on this occasion.

Hamm no longer works for Respondent, and did not testify. Moye did testify concerning the one occasion when he saw Lucas. Moye testified that he did not raise the subject of the Union when he spoke with Lucas.

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For several reasons, I credit the testimony of Moye where it conflicts with that of Lucas. In general, Moye's demeanor impressed me as reliable. When Moye had testified to the edge of his memory, he freely admitted his limitations and declined to venture into conjecture.

Additionally, even though Moye remained employed by Respondent and was called by Respondent to the stand, parts of his testimony were not favorable to the Respondent's case. Indeed, after hearing Moye's testimony, Counsel for General Counsel amended the Complaint to allege an additional Section 8(a)(1) violation. Moye's manifest allegiance to the truth convinces me that his testimony should be trusted.

Moye contradicted Lucas primarily on a minor point which is not central to the allegation in Complaint Paragraph 7(b). However, rejecting the testimony of Lucas on this one point renders the remainder of his testimony rather precarious.

Specifically, in Lucas' version, Moye raised the subject of the Union, and for no apparent reason. Moye denied bringing up the Union, and I credit this denial. The effect is to move the

Lucas version from the realm of the improbable into the twilight zone of the almost impossible.

Lucas testified that on his first trip to the Jonesboro terminal, both Hamm and Moye brought up the subject of the Union's organizing effort at the Dallas facility. If Lucas had been wearing a Union button or some other insignia, it might be

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plausible that two different people would ask him about it. However, Lucas testified that he was not wearing anything to identify himself with the union.

Moreover, it had taken Lucas about eight hours to drive from Dallas, Texas, to Jonesboro, Arkansas. Considering this distance, it seems a little unusual for the organizing drive at the Dallas facility to be on the tips of two different tongues in Jonesboro.

Certainly, that is not a likely possibility. Of course, improbable things do occur every now and then, and the testimony of Lucas should not be rejected simply because it is not happily congruent with everyday experience. However, when part of the improbable version collides with the testimony of a highly credible witness such as Moye, the improbable account must fall.

It is true that only two people, Lucas and Hamm, were present when Hamm allegedly questioned Lucas about the Union. It is also true that only Lucas testified and, therefore, his version is uncontradicted.

However, for the reasons I have discussed, I cannot conclude that the Lucas version is sufficiently reliable to carry the Government's burden of proof; I do not find it entitled to any weight. Therefore I recommend that the allegations in Complaint Paragraph 7(b) be dismissed.

Complaint Paragraph 7(c)

At hearing, the General Counsel amended the Complaint to add the following Paragraph 7(c): "On or about July 13, 1999, the exact date unknown to the General

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Counsel at this time, Respondent, by Doug Hamm at Respondent's Jonesboro, Arkansas, facility, interrogated employees about their union activities and the union activities of other employees."

The General Counsel bases this allegation on the testimony of Jonesboro terminal employee Berry Shane Moye, concerning the events on the day Lucas made his first trip to that terminal. For the reasons I have already discussed, I have decided not to credit Lucas' testimony, and give it no weight. I do credit Moye's testimony.

Hamm did not testify, and, apart from Lucas' testimony, there is no direct evidence concerning exactly what Hamm and Lucas said to each other inside the terminal. However, it reasonably may be inferred that the conversation concerned the union organizing effort at the Dallas terminal. This inference flows from the substance of a warning later Lucas later received, in evidence as General Counsel's Exhibit 2, for reportedly distributing Union literature at the Jonesboro facility in violation of the Respondent's no solicitation/no distribution rule.

Additionally, the testimony of Jonesboro terminal employee Moye, which I credit, supports an inference that Hamm and Lucas discussed the Union organizing campaign. According to Moye, at the time of the conversation between Hamm and Lucas, several employees, including Moye, were on the dock during a break,

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Terminal Manager Hamm came outside and the employees walked over to him. In Moye's words, Hamm was, "Kind of laughing," and asked the employees if Lucas had talked about the Union with any of them; Moye replied yes, and Hamm said nothing else.

The record is not clear on whether Lucas was an open adherent of the Union at the time of Hamm's question to the other workers. There is no evidence that Lucas wore any Union insignia while visiting the Jonesboro facility. Hamm did not testify, and no credible evidence resolves whether or not Lucas told Hamm about his role in the Union's organizing effort.

Although the date of Lucas' first trip to Jonesboro is not free from doubt, it appears to have been on Tuesday, July 13, 1999. On that same date, the Union sent a letter by facsimile to the Respondent's Dallas terminal. Although this letter did not spell his name correctly, it did identify Lucas and certain other employees as "In–plant organizers." It is not clear whether Respondent had received this letter in Dallas before or after the alleged interrogation in Jonesboro.

Complaint Paragraph 7(c), amended into the Complaint orally at hearing, alleges Hamm's questioning to be an unlawful interrogation. To determine whether it violated Section 8(a)(1) of the Act, I will apply the criteria discussed in *Smith and Johnson Construction Company*, 324 NLRB [970] No. 153 (October 31, 1997). In that case, the Board affirmed the Administrative Law

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Judge's analysis of certain statements alleged to violate Section 8(a)(1) of the Act.

The Judge had described the framework for that analysis in these terms:

> In deciding whether interrogation is unlawful, I am governed by the Board's decision in ***Rossmore House***, 269 NLRB 1176 (1984). In that case, the Board held that the lawfulness of questioning by employer agents about union sympathies and activities turned on the question of whether ``under all circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act.'' The Board in *Rossmore House* noted the [test set forth in *Bourne Co. v. NLRB*, 332 F.2d 47 (2d Cir. 1964)] was helpful in making such an analysis. The ***Bourne*** test factors are as follows:
>
> 1.The background, i.e. is there a history of employer hostility and discrimination?
>
> 2. The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?
>
> 3. The identity of the questioner, i.e. how high was he in the Company hierarchy?

4. Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of ``unnatural formality''?

5. Truthfulness of the reply.

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Several of these factors militate against finding Hamm's question to be violative. The record here does not disclose a history of employer hostility and discrimination. Hamm did not call the employees into a locus of authority, such as his office, and the atmosphere was not unnaturally formal. To the contrary, Moye described Hamm as "kind of laughing." Additionally, Moye responded to the question truthfully, and Hamm did not pursue the subject.

Although these factors weigh against finding a violation, two other factors pull in the opposite direction. The information Hamm sought directly concerned an employee's union activities. Significantly, Dallas Terminal Manager Hardwick later issued Lucas a written warning based upon a report Hardwick had received from Jonesboro Terminal Manager Hamm.

It may be argued that this warning memorandum, in evidence as General Counsel's Exhibit 2, did not depend on the information Hamm elicited from Moye. The memo did not discipline Lucas for talking with other employees about the Union but rather for distributing Union literature in violation of Respondent's no–solicitation/no–distribution rule.

Hamm did not ask the employees if Lucas had given them

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Union literature but only if Lucas had talked about the Union. Thus the connection between the information elicited by Hamm and the warning to Lucas may be challenged. However, I believe such an argument comes a little close to splitting hairs. Hardwick did admonish Lucas for talking to other employees about the Union.

To determine whether an interrogation is coercive and, therefore, violative, the Board applies an objective standard. It decides what reasonably would be the effect of the questioning on the employees' willingness to exercise their Section 7 rights.

I conclude that asking employees if another employee has spoken with them about the Union, followed by warning that employee a few days later, reasonably would discourage employees from engaging in protected activities.

The record does not disclose precisely where Hamm, as terminal manager, lay in the Respondent's chain of command. However, Respondent has admitted that Hamm was its supervisor and agent. And presumably, the terminal manager is the highest ranking supervisor at a particular location. That fact also weighs in favor of finding Hamm's question coercive.

In sum, I conclude that the factors militating towards finding a violation outweigh the factors against finding a violation. Therefore I recommend that the Board find that Hamm's questioning of Moye and the other employees violated Section 8(a)(1) of the Act, as alleged.

Complaint Paragraph 8

Complaint Paragraph 8, as amended orally at hearing, alleges that on or about August 26, 1999,

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Respondent, at its Grand Prairie facility, by use of still and video cameras, attempted to intimidate employees by conducting surveillance and/or creating the impression that it was conducting surveillance of employees' union activities.

Sometime around 7:30 a.m. on August 26, 1999, the Union began handbilling at an entrance to the Respondent's Dallas terminal. Union representative Michael Kline estimated that between 35 and 40 handbillers, mainly drivers employed by other freight companies, participated. The Union instructed the handbillers to stand in the center of the drive into the terminal so that they could give handbills both to drivers entering and leaving the facility.

According to Kline, the Union told the handbillers that they could offer handbills to drivers of tractor–trailers leaving the facility, but should not handbill trucks coming into the facility. However, Raymond Rios, a security investigator employed by Respondent's parent corporation, credibly testified that he saw one incident in which handbillers approached a tractor–trailer as it entered the property, causing it to stop while the rear of the trailer remained on the public road. He heard a screech of tires, signifying that the driver behind the truck had to make a sudden stop, although there was no collision.

Contrary to Rios, Kline denied that the handbillers slowed down traffic coming into the terminal. However, Kline's

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testimony is not entirely convincing on this point. In fact, Kline observed that at the start of the handbilling, "we had some over–anxious volunteers, and we had too many out there."

Photographs taken by Rios show a substantial number of handbillers, although it is possible that these pictures reflected only the number present during a brief period of time. I credit Rios, rather than Kline, and find that the handbillers at least occasionally slowed down incoming traffic, and thereby raised safety concerns. The testimony of Rios draws support not only from the photographs, but also from the amount of time police spent at the scene.

There is a conflict as to how many times Respondent summoned the police, but it did so at least twice on this day. Respondent's Regional Operations Manager, John Smith, credibly testified that he first called the police between 8:30 and 9:00 a.m. and, when the police arrived, he told them that he believed the handbillers were trespassing on Respondent's property

The police spoke with Union representative Kline and moved most of the handbillers across the street, leaving two or three at the entrance, where they could continue to distribute handbills. Smith testified that he was satisfied with this arrangement, but it did not last. About 45 to 60 minutes after the police left, Smith received complaints from some of Respondent's drivers. He called the police and complained that

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the handbillers were again trespassing on Respondent's property and impeding the flow of traffic coming into the terminal.

The police returned and put up a yellow barrier to limit the area in which handbilling could take place. There is some in-

consistency in the record regarding whether the police remained at the site or, instead, left and came back. According to Smith, the police stayed. Union representative Kline's testimony indicates that the police left and returned several times. However, there is no doubt that police were present much of the time. As Kline put it, quote, "We were well protected."

The record indicates that Regional Operations Manager Smith was the highest ranking official of Respondent at the Dallas terminal on this occasion. Smith spent a lot of time in the guard shack, using a cell–phone to confer with higher management about the situation. The record does not reflect who made the decision to photograph the handbillers, though Smith clearly concurred in that decision. When the police returned the second time, Smith expressed dissatisfaction with their efforts and told them that he was going to take photographs.

Actually, Smith did not wield a camera. That task fell to Rios, who went home and returned with both a 35 millimeter still camera and a video camcorder. He mounted each on a tripod within the guard shack. Because of a technical problem, Rios

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did not use the cam–corder, but he did take still pictures. Sixty of them are in evidence as General Counsel's Exhibit 4.

The evidence establishes without contradiction that Rios took the photographs from within the guard shack, which is a permanent building with its own plumbing. The record is less consistent concerning how far the guard shack was from the handbillers. One of Respondent's employees, Ricky Ray Watson, testified that the guard shack was 70 yards from the entrance at which the handbilling took place. Smith testified that it was about 150 yards from this entrance.

Although there is no evidence which would provide an exact distance, I find that the guard shack was at least 70 yards away from the handbillers. This distance would appear consistent with the photographs of the handbillers which Rios made from the guard shack.

Rios testified that he photographed the handbillers with a 35 millimeter camera, using a 300 millimeter lens. I take administrative notice that such a lens on a 35 millimeter camera typically would produce a magnification of about six diameters. A good estimate of the distance between the guard shack and the handbillers might be obtained by measuring the image of the handbillers on the negatives of these photographs, but the negatives are not in evidence. However, the prints do not suggest to me that the camera was particularly close to the handbillers, and, in the absence of more exact evidence, I accept Watson's estimate of the distance as a reasonable "ball-

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park" figure.

Three of Respondent's employees testified that they saw the cameras in the guard shack. These employees were much closer than the handbillers at the entrance. For example, one of the employees, Jeff DeWitt, testified that he had parked in the employee parking lot and passed the guard shack on foot.

There is no evidence to establish that handbillers at the entrance could discern the cameras within the guard shack from their vantage point. However, the issues raised in Complaint Paragraph 8 do not depend on whether the handbillers at the entrance could see the cameras. Respondent's own employees could get much closer, and some of them did, discovering the presence of the photographic equipment. I must decide whether this sight reasonably conveyed to them the impression of surveillance, which could chill their exercise of Section 7 rights.

The record does not establish that Respondent set up the cameras with the intention of creating such a chilling effect. To the contrary, I find that the Respondent intended to photograph as unobtrusively as possible. However, the Respondent's intentions are irrelevant.

In determining whether conduct violates Section 8(a)(1) of the Act, the Board generally considers the Employers motivation or intent to be irrelevant. Instead, it applies an objective standard to assess whether or not the conduct reasonably would tend to interfere with employees' exercise of Section 7 rights.

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I will apply such an objective standard here.

When the conduct in question involves an employer photographing or videotaping handbilling or picketing, the analysis begins with the presumption that such activity tends to discourage the exercise of Section 7 rights and will be unlawful absent a specific justification. The Board summarized its standards in *National Steel and Shipbuilding Company*, 324 NLRB 449 (1997). It stated in part as follows:

> [T]he fundamental principles governing employer surveillance of protected employee activity are set forth in *F. W. Woolworth Co.*, 310 NLRB 1197 (1993). The Board in *Woolworth* reaffirmed the principle that an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. Photographing and videotaping such activity clearly constitute more than mere observation, however, because such pictorial recordkeeing tends to create fear among employees of future reprisals. The Board in *Woolworth* reaffirmed the principle that photographing in the mere belief that something might happen does not justify the employer's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity . . . Rather, the Board requires an employer engaging in such photographing or videotaping to demonstrate that it had a reasonable basis to

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have anticipated misconduct by the employees.

"[T]he Board may properly require a company to provide a solid justification for its resort to anticipatory photographing." *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 701 (7th Cir. 1976) The inquiry is whether the photographing or videotaping has a reasonable tendency to interfere with protected activity under the circumstances in each case. *Sunbelt Mfg., Inc.*, 308 NLRB 780 fn. 3 (1992), affd. in part 996 F.2d 305 (5th Cir. 1993).

See 324 NLRB at 499 (certain citations and footnote omitted).

The Board also noted in *National Steel* that an Employer's subjective, honest belief that unprotected activity may occur

does not constitute solid justification for recording protected activity, such as handbilling. Rather, as the quoted portion indicates, the Employer must show that it has a reasonable, objective basis for anticipating misconduct.

However, as the Board stated in *Ordman's Park and Shop*, 292 NLRB 953 (1989), where photographs are taken for the purpose of gathering evidence and there is no showing of coercion of employees, such photographing is not unlawful. To reach this conclusion, the Board relied on *Roadway Express*, 271 NLRB 1238 (1984) and *Berton Kirshner, Inc.*, 209 NLRB 1081 (1974), enfd. 523 F.2d 1046 (9th Cir. 1975).

I believe that the Board's holding in *Ordman's Park and Shop* must be read with caution. In *Ordman's Park and Shop*, the Board appeared to place considerable weight on the fact that the

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persons photographed were not employed by the Employer but, instead, were paid pickets. However, in *Waco, Inc.*, 273 NLRB 746, 747 (1984), citing *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), the Board held that it did not matter whether or not the persons photographed were employed by the respondent. In view of the Supreme Court's later decision in *NLRB v. Town & Country Electric*, [516 U.S. 85] 150 LRRM 2897 (1995), the principle expressed in *Waco* should have even greater force.

Therefore it does not matter that most of the handbillers were not employed by SAIA but, instead, worked for other companies. On the other hand, another principle which the Board expressed in *Ordman's Park and Shop* does remain applicable. An employer may photograph handbillers or pickets to support a legal trespass claim. However, the Employer must have more than a mere belief that something might happen; it must have an objective basis. Indeed, an employer must demonstrate a reasonable basis to expect misconduct. See *Sonoma Mission Inn & Spa*, 322 NLRB 898 (1997).

The facts in the present case lie close to the line dividing the permissible from the impermissible. Before Respondent began photographing the handbillers, they had already impeded traffic into the plant to the extent that the police had to be called more than once.

Although Union representative Kline disputed the assertion that handbillers impeded the flow of traffic, Kline admitted, "At the start, we had some

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over–anxious volunteers, and we had too many out there."

Considering that comment, together with the testimony of the Respondent's witnesses, I find that the handbillers did in fact interfere with the flow of traffic into and out of the terminal. It is more difficult to determine whether the handbillers actually trespassed on Respondent's property, because there was confusion regarding Respondent's property line. Respondent bears the burden of proof on this issue. And I find that Respondent has not met the burden of establishing that the handbillers trespassed.

However, I conclude that the photographing of the handbillers may be justified even if they did not trespass. Impeding the flow of traffic by itself creates a sufficient problem that Respondent had a legitimate reason for concern, particularly because of the possibility that its vehicles would be involved in accidents. Perhaps the continued presence of the police at the scene reduced the likelihood of an accident, but the Respondent's concern still was based upon the events of the day, and not on mere speculation.

Additionally, I need not determine whether or not the handbillers were engaged in misconduct when their actions impeded the flow of traffic. See *Cable Car Charters*, 324 NLRB 732 (1997).

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It is sufficient that Respondent took the photographs to gather evidence to take legal action. However, it is not clear from the record exactly why the Respondent did decide to take photographs. Regional Operations Manager Smith testified that he did not believe the police were doing their job and told them so. However, the record does not indicate whether Respondent wished to use the photographs to support a complaint against the police or as evidence to seek an injunction against the handbillers.

Even though the record could reflect the Respondent's reasons more exactly, I find that they were sufficient to establish a solid justification for taking the photographs, namely the gathering of evidence. Additionally, although a few of its employees saw the cameras in the guard house, I believe that the impact on protected rights was de minimis. Therefore I recommend that this allegation be dismissed.

Complaint Paragraph 9

Complaint Paragraph 9(a) alleges that on or about July 21, 1999, Respondent issued a disciplinary warning to employee Steve Lucas. Respondent's answer admits that it issued such a warning to Lucas, as alleged.

Complaint Paragraph 9(b) alleges that Respondent issued this warning because Lucas joined and/or supported the Union and engaged in protected, concerted activities, and to discourage employees from engaging in such activities. Respondent has denied this allegation.

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The warning takes the form of a July 21, 1999 memorandum to Lucas from Dallas Terminal Manager M. D. Hardwick. It is in evidence as General Counsel's Exhibit 2, and it states as follows:

> Stephen:
>
> I received a call from Doug Hamm, terminal manager in Jonesboro, Arkansas, and was advised that you had been distributing UNION literature at the Jonesboro terminal on Tuesday 7/13. This is a direct violation of the companys [sic] no solicitation policy and will not be tolerated. Any further incidents of this nature will result in disciplinary action.

Before discussing the circumstances leading up to this warning, it should be noted that the Complaint does not allege that Respondent promulgated, maintained or enforced an unlawful no–solicitation or no–distribution rule. Moreover, the record

does not reflect the substance of the Respondent's rule as it appeared in the Respondent's employee manual, and that manual is not in evidence.

Rules which limit union–related solicitation and distribution constitute an exception to the principle that an Employer may not interfere with, restrain or coerce employees in the exercise of Section 7 rights. All the same, it would be inappropriate to presume that the Respondent had published in its employee manual an unlawful no–solicitation or no–distribution rule where the Government has not alleged the rule to be unlawful and has not sought to prove that it was unlawful. In the absence of evidence to the contrary, I will assume that

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the rule published in the employee manual complies with the law.

On July 13, 1999, Respondent's Dallas terminal manager, M. D. Hardwick, received by facsimile a letter from the Union stating that the Union was in the process of organizing the Respondent's employees and naming six employees who were "in–plant organizers." Stephen Lucas was one of the six.

Hardwick met with Lucas, advised him that he had been identified as an organizer, that he would be treated the same as all other employees, read him an example of the no–solicitation/no–distribution policy in the employee handbook and asked Lucas if he understood. Lucas said that he did.

Hardwick later received a call from Jonesboro Terminal Manager Hamm. Hardwick credibly testified that Hamm "advised me that, I can't remember the exact day of the week, but Mr. Lucas had been in Jonesboro, and that he had union literature with him and that he was talking to employees there and had left the literature there at the terminal."

Hardwick called the Respondent's human resources department and reported the matter. Hardwick left a note for Lucas to see him, and Lucas came in. Hardwick testified that he advised Lucas of his phone call with Jonesboro Terminal Manager Hamm and "that he had been in the Jonesboro terminal with union literature and that he had made it available for the employees there and was talking to the employees about the Union and the organizing effort, that it was in direct violation

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of the company's no–solicitation policy, that it needed to stop and that, if it didn't stop, it could lead to further disciplinary action up to and including discharge."

For reasons I will discuss, I find that Hardwick's action violated the Act in two separate ways. First, I find that Hardwick's words constitute the promulgation of an unlawful no–solicitation/no–distribution rule apart from that in the employee manual. As already noted, the evidence does not establish that the Respondent's general no–solicitation/no–distribution policy published in the employee handbook violates the Act. But even assuming, as I do, that the published policy complies with the law, Hardwick issued a more restrictive policy applicable to a known Union adherent when he disciplined Lucas.

Hardwick's testimony establishes that in describing the policy to Lucas, he did not limit it in ways which would bring it within the law. For example, Hardwick did not distinguish between working and non–working time or between work and non–work areas. Instead, Hardwick told Lucas that he was being warned because Lucas had "been in the Jonesboro terminal with union literature," had made this literature available to employees and had been "talking to the employees about the Union and the organizing effort."

Hardwick further told Lucas "that if it didn't stop, it could lead to further disciplinary action up to and including

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discharge." In warning Lucas not to engage in such activities, Hardwick was imposing on Lucas an overly broad no–solicitation and no–distribution rule and requiring him to follow it or else receive further discipline, perhaps even discharge.

It may be noted that Hardwick announced this overly broad rule selectively to one employee already identified as a Union adherent, in fact, to the one employee known to have engaged in union activity. However, the selective application of a rule to a known Union adherent, although itself violative, is not an essential element in finding a violation. Imposing such an overly broad no–solicitation/no–distribution policy on any employee or on all employees also would interfere with, restrain and coerce employees in the exercise of Section 7 rights and, therefore violate Section 8(a)(1).

In finding that Terminal Manager Hardwick imposed the overly–broad no–solicitation/no–distribution policy, I do not rely solely on his testimony, even though I credit that testimony. The written memorandum to Lucas similarly states an overly broad no–solicitation/no distribution–rule, specifically targeting the distribution of Union literature. Indeed this warning notice even presses the word, "UNION" in all capital letters. It clearly interferes with, restrains and coerces employees in the exercise of Section 7 rights.

Second, the disciplinary notice violates Section 8(a)(3) of

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the Act by discriminating against Lucas because of his union activities, and to discourage other employees from engaging in such protected activities. I reach this conclusion by applying the framework which the Board established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See also *Manno Electric, Inc.*, 321 NLRB [278, 280] No. 43, fn. 12 (1996).

Under this framework, once the General Counsel has established four elements, it creates, in effect, a presumption that the disciplinary action constitutes discrimination in violation of Section 8(a)(3) of the Act. A respondent may rebut this presumption by showing that it would have taken the same action even in the absence of protected activity.

First, the General Counsel must establish that the alleged discriminatee has engaged in union activity or in other protected, concerted activity. Second, the General Counsel must establish that the Respondent knew about such activity. The evidence, including the Union's July 13, 1999 letter to Terminal Manager Hardwick, establishes both of these elements.

The Government must also show that the Respondent took some adverse employment action against the alleged discriminatee. Here, the Respondent has admitted issuing the discipli-

nary warning to Lucas. I find that the General Counsel has established the third *Wright Line* element.

Finally, the General Counsel must demonstrate a link or

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nexus between the protected activity and the adverse employment action. The warning itself, with the word "UNION" in capital letters, satisfies this requirement. So does Hardwick's testimony that he told Lucas that he was being disciplined for bringing Union literature into the Jonesboro terminal and for talking to employees about the union organizing campaign.

I conclude that the evidence establishes a presumption that Respondent disciplined Lucas for his union activities and to discourage employees from engaging in such activities. Respondent has not shown that it would have taken the same action against Lucas in the absence of such protected activities.

Indeed, Respondent introduced into evidence, as Respondent's Exhibit 3, a list of employees associated with the Union organizing effort. Whatever probative value this evidence has in other respects, it certainly does not persuade me that Respondent did not care whether or not Lucas was a Union adherent at the time it disciplined him.

In sum, I find that Respondent's discipline of Lucas violated the Act, as alleged in Complaint Paragraph 9.

After the parties receive the transcript of this proceeding, I will prepare a Certification of Bench Decision which will include as an appendix the portions of the transcript which record this bench decision. The certification will also include the provisions related to remedy, order and notice.

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This Certification of Bench Decision will be served upon the parties, and, upon such service, the time period for appeal will begin to run.

I truly appreciate the courtesy and professionalism of counsel. The hearing is closed.